

2013 WL 7121488 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

James GALLOWAY, Appellant, (Defendant Below),
v.
STATE OF INDIANA, Appellee, (Plaintiff Below).

No. 82A05-1305-CR-260.
October 28, 2013.

The Honorable Richard G. D'Amour, Judge.
Appeal from the Vanderburgh Superior Court 2, Cause Nos.
82d02-1109-FC-1017 82D02-1109-Fc-1023 82D02-1109-FC-1024,

Brief of the Appellee

Gregory F. Zoeller, Attorney General of Indiana, Atty. No. 1958-98, Michael Gene Worden, Deputy Attorney General, Atty. No. 001372-49, Office of Attorney General, Indiana Government Center, South, Fifth Floor, 302 West Washington Street, Indianapolis, IN 46204-2770, Telephone: (317) 232-6327, Attorneys for Appellee.

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*1 BRIEF OF THE APPELLEE

STATEMENT OF THE ISSUE

Did the trial court **abuse** its discretion when it sentenced Defendant to twenty-four years imprisonment on multiple counts of home improvement fraud and a habitual offender finding, and is the sentence imposed inappropriate?

STATEMENT OF THE CASE

On September 16, 2011, the State charged Defendant in Cause No. 82D02-1109-FC-1017 (hereinafter “No. FC-1017”) with Count I, class C felony Home Improvement Fraud, and with being a Habitual Offender (App. 33-34). On November 21, 2011, the State charged Defendant in No. FC-1017 with Count II, class D felony Home Improvement Fraud and Count III, class C felony Home Improvement Fraud (App. 36-37). On January 5, 2012, the State charged Defendant in No. FC-1017 with Count IV, class D felony Home Improvement Fraud (App. 35).

*2 On September 20, 2011, the State charged Defendant in Cause No. 82D02-1109-FC-1023 (hereinafter “No. FC-1023”) with: Count I, class C felony Home Improvement Fraud; Count II, class D felony Home Improvement Fraud; and with being a Habitual Offender (App. 40-42). Also on September 20, 2011, the State charged Defendant in Cause No. 82D02-1109-FC-1024 (hereinafter “No. FC-1024”), with: Count I, class C felony Home Improvement Fraud; Count II, class D felony Home Improvement Fraud; and with being a Habitual Offender (App. 46-48). On October 2, 2012, the State filed a motion to join all of the offenses for trial, which the trial court granted on that date (App. 23, 91-92). On November 15, 2012, Defendant petitioned the court to order a psychiatric evaluation and the court granted that petition (App. 94-95). The doctors' reports, finding Defendant competent to stand trial, were subsequently filed in February 2013 (App. 318-26, 328-32).

On March 8, 2013, Defendant signed a rights waiver form and entered a guilty plea to all counts, including the habitual offender enhancement, without the benefit of a plea agreement (App. 2, 16,-17, 96; [Tr. 4-12](#)). The trial court held the sentencing hearing on May 13, 2013 ([Tr. 17-69](#)). At the conclusion of the hearing, the trial court sentenced Defendant to concurrent and consecutive sentences that resulted in an aggregate sentence of twelve years imprisonment, enhanced that sentence by twelve years for the habitual offender finding, and ordered the twenty-four years sentence to be served consecutively to sentences in other cases that Defendant had pending in Warrick County for similar offenses ([Tr. 67-69](#); App. 119-24).

Defendant filed his Notice of Appeal on May 29, 2013 (Clerk's Online Docket). The Notice of Completion of Clerk's Record was filed on June 24, 2013, and the Notice of Completion of Transcript was filed on August 30, 2013 (Clerk's Online Docket). The *3 Appellant's Brief and Appendix were filed on September 25, 2013, with mail service on the State (Clerk's Online Docket).

STATEMENT OF THE FACTS

Defendant engaged in home improvement fraud with numerous **elderly** individuals that cost those individuals thousands of dollars (Tr. 9-12). The money that Defendant took from these people and his failure to carry out the home improvement contracts that he had with these people severely impacted their lives, both **financially** and emotionally (Tr. 18-28, 36-39). Defendant primarily used the money that he took from these **elderly** individuals to feed his gambling and **alcohol addictions** (Tr. 19, 49-50). Defendant has a long history of substance **abuse** (App. 532) and a criminal history that dates back to 1974, which is primarily comprised of home improvement fraud and theft convictions (App. 105-07, 531). There are also numerous additional home improvement fraud victims whose cases remained uncharged at the time of Defendant's sentencing in the present cases (App. 102-06).

During the sentencing hearing in this case, the State argued that the following aggravating circumstances were present: (1) Defendant's extensive criminal history; (2) that the victims of the crimes were at least sixty-five years of age at the time of the crimes; (3) that the victims were mentally or physically infirm; and (4) that the charges to which Defendant pled guilty were part of a series of crimes that were committed over a significant period of time (Tr. 41-44). The State argued for a sentence of thirty-six and one-half years imprisonment (Tr. 47-48). Defendant presented the trial court with the following mitigating circumstances: (1) these were not crimes of violence; (2) Defendant is an educated business man who enjoys family support; and (3) Defendant's gambling addiction and alcohol **abuse** issues (Tr. 48-53). It also appears that Defendant, through his sister's testimony, was urging as a mitigating circumstance *4 that he had a bad childhood (Tr. 54-55). Defendant advocated a sentence of approximately fifteen years but with most of the sentence served by means other than incarceration (Tr. 60-62).

In sentencing Defendant, the trial court found the following aggravating circumstances: (1) that Defendant preyed upon the **elderly**; (2) Defendant's extensive criminal history that primarily consisted of home improvement fraud convictions; and (3) that Defendant was likely to re-offend (Tr. 65-67). For mitigating circumstances, the trial court found only the fact that Defendant pled guilty (Tr. 66). The trial court found that the aggravating circumstances outweighed the mitigating circumstance (Tr. 66).

In No. FC-1017, the trial court sentenced Defendant to four years imprisonment on Counts I and III, and to one and one-half years imprisonment on Counts II and IV (Tr. 68). All of these counts were ordered served concurrently (Tr. 68). In No. FC-1023, the trial court sentenced Defendant to concurrent sentences of four years imprisonment on Count I and one and one-half years imprisonment on Count II; however, this sentence was ordered served consecutively to the sentence in No. FC-1017 (Tr. 68). For No. FC-1024, the trial court sentenced Defendant to concurrent sentences of four years imprisonment on both Counts I and II; however, this sentence was ordered served consecutively to the sentences in the other two causes (Tr. 68). The trial court also imposed an additional twelve year sentence for the habitual offender finding (Tr. 68-69). The trial court further ordered the twenty-four year sentence for these three causes to be served consecutively to Defendant's several pending cases in Warrick County (Tr. 69).

SUMMARY OF THE ARGUMENT

The trial court did not **abuse** its discretion when it did not find that Defendant's gambling and **alcohol addictions** constituted significant mitigating circumstances. Defendant has not *5 demonstrated that these proffered mitigating circumstances are significant and clearly supported by the record. The sentence imposed, moreover, is not inappropriate in light of the nature of the offense and Defendant's character. The nature of the offense is more egregious than the average home improvement fraud offense in that Defendant preyed on numerous **elderly** individuals. Moreover, Defendant's character, as demonstrated by his extraordinary criminal history of home improvement fraud convictions alone, is exceedingly poor.

ARGUMENT

The Trial Court Did Not Abuse Its Discretion in Sentencing Defendant And The Sentence Imposed is Not Inappropriate

STANDARD OF REVIEW

Sentencing rests within the sound discretion of the trial court and, if the sentence is within the statutory range, the sentence is reviewed on appeal only for an abuse of discretion. *Kovats v. State*, 982 N.E.2d 409, 415 (Ind. Ct. App. 2013); *Croy v. State*, 953 N.E.2d 660, 663 (Ind. Ct. App. 2011). That is, imposition of sentence is a discretionary function in which the trial court's judgment should receive considerable deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Moreover, an abuse of discretion occurs only where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Anderson v. State*, 989 N.E.2d 823, 826 (Ind. Ct. App. 2013); *Croy*, 953 N.E.2d at 663.

Nevertheless, even where a trial court has not abused its sentencing discretion, the Indiana Constitution, as implemented through Indiana Appellate Rule 7(B), authorizes an appellate court to independently review and revise the sentence. *Pierce v. State*, 949 N.E.2d 349, 352 (Ind. 2011). This constitutional review permits an appellate court, after giving due consideration to the trial court's sentencing decision, to revise a sentence where the sentence *6 imposed is inappropriate in light of the nature of the offense and the defendant's character. *Id*; *Chapell v. State*, 966 N.E.2d 124, 133 (Ind. Ct. App. 2012), trans. denied. That an appellate court must give due consideration to the trial court's sentencing decision is based on the fact of the trial court's unique perspective in the sentencing process. *Kovats*, 982 N.E.2d at 416 (citing *Trainor v. State*, 950 N.E.2d 352, 355 (Ind. Ct. App. 2011), trans. denied); *Allen v. State*, 925 N.E.2d 469, 481 (Ind. Ct. App. 2010), trans. denied (citing *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007)). Under an appropriateness review, the question is not whether another sentence would be more appropriate; rather, the question is whether the sentence imposed is inappropriate. *Steinberg v. State*, 941 N.E.2d 515, 535 (Ind. Ct. App. 2011), trans. denied. That is, appropriateness review is not a matter of second guessing the trial court's sentence. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Ultimately, whether a sentence is inappropriate turns on the defendant's culpability, the severity of the crime, the damage done to others, and a myriad of other factors that may be found in a given case. *Mefford v. State*, 983 N.E.2d 232, 236 (Ind. Ct. App. 2013). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Spear v. State*, N.E.2d, 2013 WL 2367980, at *10 (Ind. Ct. App. May 31, 2013), trans. denied; *Chapell*, 966 N.E.2d at 133; *Hall v. State*, 944 N.E.2d 538, 541 (Ind. Ct. App. 2011).

*7 DISCUSSION¹

The trial court did not abuse its discretion when it did not find as significant mitigating circumstances Defendant's gambling and alcohol addictions. Moreover, the sentence imposed is not inappropriate in light of the nature of the offenses and Defendant's character. In fact, considering Defendant's extensive home improvement fraud criminal history, the sentence, if anything, is inappropriately light.

A. Abuse of Discretion

The State acknowledges that one of the ways in which a trial court may abuse its sentencing discretion is to omit from its sentencing statement reasons that are clearly supported by the record and advanced for consideration as mitigating circumstances by the defendant. *Bryant v. State*, 984 N.E.2d 240, 251 (Ind. Ct. App. 2013), trans. denied. Thus, the failure to find mitigating circumstances clearly supported in the record may imply that the trial court improperly overlooked these mitigating circumstances. *Rogers v. State*, 958 N.E.2d 4, 9 (Ind. Ct. App. 2011). However, the determination of mitigating circumstances is within the trial court's discretion and the trial court is neither obligated to accept a defendant's argument as to what constitutes a mitigating circumstance nor is the trial court required to accord the same weight to a proffered mitigating

circumstance as does the defendant. *8 *Healey v. State*, 969 N.E.2d 607, 616 (Ind. Ct. App. 2012), trans. denied. Nor is the trial court required to explain why it did not find a proffered mitigating circumstance. *McBride v. State*, 992 N.E.2d 912, 920 (Ind. Ct. App. 2013). Where a defendant argues on appeal that the trial court failed to find a mitigating circumstance that was proffered at trial, the burden is on the defendant to show that the proffered mitigating circumstance is both significant and clearly supported by the record. *Guzman v. State*, 985 N.E.2d 1125, 1133 (Ind. Ct. App. 2013); *Healey*, 969 N.E.2d at 616. Moreover, “[a] trial court does not err in failing to find a mitigating factor where that claim is highly disputable in nature, weight, or significance.” *Healey*, 969 N.E.2d at 616.

In the present case, the trial court found that Defendant's guilty plea constituted a significant mitigating circumstance but did not find that Defendant's gambling and **alcohol addictions** did so (Tr. 66). The record contains evidence that Defendant had previously been diagnosed with a pathological gambling addiction and alcohol dependency (App. 321, 329). The trial court acknowledged having reviewed this information (Tr. 63). Moreover, this was argued to the trial court as a mitigating circumstance at the sentencing hearing (Tr. 49-50, 52-53, and 55). Thus, it cannot reasonably be maintained that the trial court did not consider this factor. Rather, it is reasonable to find that the trial court simply did not believe that based on all of the circumstances that Defendant's gambling and **alcohol addictions** constituted clearly significant mitigating circumstances. See *Townsend v. State*, 860 N.E.2d 1268, 1272 (Ind. Ct. App. 2007), trans. denied (the fact that the trial court did not find the defendant's minimal criminal history as a mitigating circumstance did not present a situation where the trial court was not aware of it or overlooked it where trial court considered and discussed the defendant's criminal history at sentencing).

*9 First, it appears that Defendant has long known of his gambling and **alcohol addiction** issues but has not made any effective effort to treat the addictions; in fact, Defendant stopped taking his medication once he was released from treatment in 2011 (App. 321). Defendant's most recent attempt at treatment, moreover, appears to have occurred when he was aware that charges would be filed against him (App. 532). It is arguable that this attempt at treatment, considering Defendant's extensive contacts with the criminal justice system, was nothing more than a ploy to manufacture a mitigating circumstance for his sentencing rather than a serious attempt at rehabilitation. Second, these “addictions” are based on Defendant's voluntary actions. No one forced Defendant to take up gambling and drinking. These were his choices, with the drinking having been chosen at an early time in his life when such was illegal for him (App. 532). For these reasons, Defendant's gambling and **alcohol addictions** are not necessarily clear and significant mitigating circumstances.

Furthermore, the record shows that Defendant has an extensive substance **abuse** history that includes not only alcohol but also various illegal substances (App. 320-21, 532). The fact that Defendant has long used illegal substance could readily have been found to constitute an additional aggravating circumstance because it shows he has committed additional crimes and has no respect for the law. *Healey*, 969 N.E.2d at 617; *Caraway v. State*, 959 N.E.2d 847, 852 (Ind. Ct. App. 2011), trans. denied.

Finally, even if the trial court **abused** its discretion when it did not find that Defendant's gambling and **alcohol addictions** constituted significant mitigating circumstances, such was harmless because the trial court would have imposed the same sentence with these mitigators. The trial court sentenced Defendant to four years imprisonment on each of the class C felony convictions and to one and one-half years imprisonment for each of the class D felony *10 convictions (Tr. 67-69). These are the advisory sentences for each of these two classes of felonies. Ind. Code §§35-50-2-6(a) and 35-50-2-7(a). Furthermore, the trial court imposed consecutive sentences for each separate cause number (Tr. 67-69). These cause numbers involved different victims; in fact, each count in each cause number involved a separate victim (App. 33-37, 41-42, 46-47). Consecutive sentences are generally necessary to vindicate the fact of separate victims and the harms suffered by the separate victims. *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003); *Townsend v. State*, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007), trans. denied. Here, the trial court imposed the advisory sentence and only made the three separate cause numbers consecutive when it could have ordered consecutive sentences on every count of the three causes. It is unlikely that consideration of Defendant's gambling and **alcohol addictions** as mitigating circumstances would have produced a more lenient sentence, particularly in light of Defendant's extensive criminal history. Thus, any error in not finding these proffered mitigating circumstances was harmless. See *Deloney v. State*, 938 N.E.2d 724, 733 (Ind. Ct. App. 2010), reh'g. denied, trans. denied (**abuse** of discretion in finding victim's mental infirmity as an aggravating circumstance was harmless where court would have imposed same sentence based on the defendant's

criminal history and the fact the court imposed the advisory sentence). In addition, where a trial court abuses its discretion in sentencing such is harmless where the sentence imposed is not inappropriate. *Melton v. State*, 993 N.E.2d 253, 260 n.6 (Ind. Ct. App. 2013) (citing *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007), trans. denied). Here, as argued below, the sentence imposed is not inappropriate.

For all of the above reasons, the trial court did not abuse its discretion when it declined to find Defendant's gambling and alcohol addictions to constitute significant mitigating circumstances.

*11 B. Appropriateness Review

The sentence imposed in this case is not inappropriate in light of the nature of the offense and Defendant's character. For a defendant's sentence to be inappropriate, a defendant must demonstrate that his sentence is inappropriate in light of both the nature of the offense and his character. *Anderson*, 989 N.E.2d at 827 (defendant bears the burden of showing that both prongs of the appropriateness inquiry favor sentence revision); *Gil v. State*, 988 N.E.2d 1231, 1237 (Ind. Ct. App. 2013) (before an appellate court may revise a sentence the defendant must show that the sentence imposed is inappropriate in light of *both* the nature his offenses and his character). Under appropriateness review, the advisory sentence is the starting point. *Mefford*, 983 N.E.2d at 236.

In the present case, as set forth above in the abuse of discretion section of the State's argument, the trial court imposed the advisory sentence for each count. Furthermore, although each count in each cause number involved a separate victim, the trial court only imposed consecutive sentences for the three cause numbers. This resulted in a sentence of only twelve years imprisonment. In light of Defendant's extensive criminal history and the significant financial and emotional harm that he caused his elderly victims (Tr. 19-20, 23-26, 36), this is indeed a lenient sentence. The actual sentence of twenty-four years is due to the habitual offender enhancement, which further highlights Defendant's criminal history.

Defendant argues that his total sentence is excessive because the nature of his offense did not result in violence to the victims and because his character is that of a solid businessman with a good reputation. Although he may not have committed actual violence upon his elderly victims, he nonetheless threatened them and placed them in fear (Tr. 25, 28, 38). More significantly, Defendant's extensive criminal history, which is primarily comprised of home *12 improvement fraud convictions, demonstrates clearly that he is not a solid businessman with a good reputation but is instead a consummate con man who preys on the elderly (App. 105-07, 531). In addition, Defendant has not yet been charged in numerous additional instances of home improvement fraud (App. 102-05). Furthermore, Defendant has a long history of substance abuse (App. 320-21, 532). This use of illegal substances shows that he has violated the law numerous times more than what his convictions show and demonstrates his disdain for the law.

Nor is Defendant's claim that his sentence is harsh due to his age of any help to his cause. Defendant has been committing these offenses since 1974 (App. 531). If anything, his predilection toward crime has become worse with age. Moreover, there is nothing in Defendant's history to indicate that a lesser sentence that would result in his earlier release from prison would in any way result in Defendant's rehabilitation; rather, it is clear that Defendant will very likely return to defrauding the elderly and only a significant prison sentence will protect them from this predator. For these reasons, the nature of the offense is egregious and Defendant's character is poor in the extreme. Defendant has not demonstrated that the sentence imposed is inappropriate, other than that it is inappropriately light.

For all of the above reasons, the trial court did not abuse its discretion in the finding of aggravating and mitigating circumstances and the sentence imposed is not inappropriate in light of the nature of the offense and Defendant's character. This Court should affirm the sentence imposed by the trial court.

*13 CONCLUSION

For the foregoing reasons, the State of Indiana respectfully urges the Court to affirm the judgment of the trial court.

Footnotes

- 1 When imposing the habitual offender enhancement, the trial court did not specify which particular underlying felony was to be enhanced ([Tr. 68-69](#)). Moreover, in the Abstract of Judgment it appears that the trial court imposed the habitual offender enhancement as a separate consecutive sentence (App. 119). However, a habitual offender enhancement is not a separate sentence that is imposed consecutively to the underlying felony; rather, it is an enhancement of one of the felony convictions. Therefore, this cause should be remanded to the trial court for the court to correct the Abstract and its judgment by enhancing the underlying felony in Count I in No. FC-1017 by the habitual offender finding. *See Tipton v. State*, 981 N.E.2d 103, 104 n.4 (Ind. Ct. App. 2012), trans. denied; *Harris v. State*, 964 N.E.2d 920, 927 (Ind. Ct. App. 2012), trans. denied; *Kocielko v. State*, 943 N.E.2d 1282, 1283 (Ind. Ct. App. 2011), *on reh'g*, trans. denied.

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